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NO. 83-.....

In The
Supreme Court of the United States
October Term, 1983

L. E. CREEL, III, *Trustee*,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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November 9, 1983

QUESTION PRESENTED

Whether Lawler Cattle Company, which has been declared by the Bankruptcy Court to be the alter ego, for all purposes, of a debtor in a bankruptcy proceeding remains a separate taxable entity.

PARTIES BELOW

Appellant in the Court of Appeals was the United States of America. Appellee in the Court of Appeals was L. E. Creel, III, Trustee. L. E. Creel, III, is acting as the Trustee for the Bankruptcy Estate of H. Roger Lawler and the following related entities: Lawler Corporation, Lawler Family Trusts, Lawler Management Corporation, and Lawler Cattle Company.

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L. E. CREEL, III, *Trustee*,
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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

L. E. Creel, III, Trustee, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Order of the Bankruptcy Judge, dated April 28, 1980, is unreported and is set forth in Appendix A. The opinion of the United States District Court, dated November 18, 1981, is unreported and is set forth in Appendix B. The opinion of the Court of Appeals, dated August 12, 1983,* is reported at 711 F.2d 575 (5th Cir. 1983) and is set forth in

*The date appearing on the published opinion, August 12, 1982, is a typographical error.

Appendix C. The opinion of the Court of Appeals, dated September 29, 1983, on Petition for Rehearing is unreported and is set forth in Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered on August 12, 1983, and its order denying the Petition for Rehearing was entered on September 29, 1983. This petition is filed within ninety days of that denial. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1966).

STATUTORY PROVISIONS

The pertinent provisions of former Section 2 of the Bankruptcy Act, 11 U.S.C.A., § 11a(15) (prior to the 1978 amendments), are set forth in Appendix E below.

STATEMENT OF THE CASE

This case arises out of an involuntary bankruptcy petition filed against H. Roger Lawler ("Lawler") in Nevada in January 1976, subsequently transferred in June 1976 to the United States Bankruptcy Court for the Northern District of Texas, and later converted in June 1979 into a voluntary arrangement.

L. E. Creel, III, Trustee for the bankrupt, instituted an adversary proceeding against Lawler Cattle Company ("Lawler Cattle") for an order declaring Lawler Cattle to be the alter ego of Lawler, thereby subjecting Lawler Cattle's assets to the claims of Lawler's creditors and subjecting Lawler to the significant claims against Lawler Cattle. The United States, a creditor of the Lawler bankruptcy estate, filed an objection to the Trustee's application. The

Bankruptcy Court had jurisdiction of this matter by virtue of the Bankruptcy Act, 11 U.S.C.A., § 11a(15) (prior to the 1978 amendments).*

Lawler Cattle was formed by Lawler as a Nevada corporation on June 4, 1973. Created to manage the ranch and cattle owned by Lawler, it entered into a written Agency Agreement under which it was to receive as compensation for its management activities fifteen percent of Lawler's net profits. Lawler made an initial capital contribution of $1,000., but no other capital was ever contributed to the corporation. Lawler was appointed President of Lawler Cattle upon its formation, and became its general manager on January 2, 1974.

The Bankruptcy Court found that, from the beginning, Lawler completely dominated, controlled, and managed the assets of Lawler Cattle, treating its business and properties as his own, and operating it as his instrumentality and agent in total disregard of the corporate form. The Bankruptcy Court further found that the creditors who had filed claims in the bankruptcy proceeding believed that Lawler Cattle was Lawler and that the credit they extended was in fact extended to Lawler. The Bankruptcy Court found that Lawler Cattle was undercapitalized from its inception and that its assets were insufficient to secure its indebtedness to the First National Bank of Nevada.

The Bankruptcy Court found that to treat Lawler Cattle as an entity separate and distinct from Lawler would perpetrate a fraud on Lawler Cattle's creditors and held that Lawler Cattle was, from its inception, the alter ego of Lawler.

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*This Court's decision in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S. Ct. 2858 (1982), is not relevant in this case.

The United States appealed the Bankruptcy Court's order to the United States District Court for the Northern District of Texas, insofar as such order required the disregard of Lawler Cattle as a separate taxable entity. The District Court had jurisdiction by virtue of the Bankruptcy ~~Reform~~ Act, ~~Pub.L. 95-598, § 405, 92 Stat. 2686 (1978)~~. The District Court held that the Bankruptcy Court's order was not clearly erroneous and affirmed on November 18, 1981.

The United States then appealed to the United States Court of Appeals for the Fifth Circuit. The United States accepted the Bankruptcy Court's findings for purposes of appeal, and contended only that the Bankruptcy Court had erred as a matter of law in giving effect to the Bankruptcy Court's alter ego order for tax purposes. Relying on this Court's decision in *Moline Properties v. Commissioner*, 319 U.S. 436, 63 S.Ct. 1132, 87 L.Ed. 1499 (1943), the Court of Appeals reversed the decisions of the Bankruptcy Court and the District Court and remanded to the District Court. The Trustee filed a Petition for Rehearing, which the Court of Appeals denied.

REASONS FOR GRANTING THE WRIT

This is a case of first impression. The Court of Appeals concludes in its judgment dated August 12, 1983, that an alter ego corporation whose insubstantial separate existence must be disregarded to avoid a fraud upon creditors must nevertheless retain its status as a separate taxable entity. The piercing of the corporate veil in the bankruptcy context by means of an alter ego determination is not uncommon. See, for example, the more than twenty cases cited in L. King, ed., 5 *Collier on Bankruptcy* § 1100.06 (15th ed. 1983). This Court itself faced this issue more than forty years ago in *Sampsell v. Imperial Paper & Color Corp.* 313 U.S. 215, *reh'g denied*, 313 U.S. 600 (1941). Accordingly,

the inequitable decision of the Court of Appeals promises to interject unwarranted tax confusion into the increasingly complex and disturbed area of bankruptcy.

Under the Court of Appeals' decision, the thrust through the corporate veil aimed to recover assets of the corporate alter ego for the benefit of the bankrupt's creditors may actually result in an additional priority tax debt. The reason is that piercing the corporate veil to extract assets to satisfy the bankrupt debtor's creditors may be treated as involuntary corporate distributions from the separate taxable entity to the debtor. Such distributions could be taxable as dividends, as a return of capital, or as liquidating distributions. Thus, the Service could tax the bankrupt on an action over which he has absolutely no control — the bankruptcy court's forcibly taking assets from his corporation and paying them to his creditors.

Moreover, the United States' position, and the decision of the Court of Appeals, grants the Internal Revenue Service a priority that appears nowhere in the bankruptcy laws. The Court of Appeals holds that, although a bankruptcy judge may strip other assets from an alter ego corporation, if the corporation has a net operating loss, the benefit of that asset is denied to the bankruptcy estate and preserved for the sole benefit of the Internal Revenue Service.

The Service apparently takes the incredible position that a bankruptcy court's alter ego determination is binding on it only if the Service stands to gain by that determination. In *Matter of Typhoon Industries, Inc.*, 6 B. R. 886 (Bankr. E.D.N.Y. 1980), the affiliates of a bankrupt corporation owed over $55,000 in back taxes. The Service filed a claim against the bankrupt corporation for these unpaid taxes and recovered when the bankruptcy court pierced the corporate veil of the affiliates and attributed their liabilities to

the debtor. It appears from the bankruptcy court's opinion that the Service did not even mention *Moline Properties*, *supra*. The instant case presents this Court with an opportunity to resolve these inconsistent decisions and force the Service to take a consistent position on the tax effect of bankruptcy alter ego determinations.

In *Moline Properties* this Court established the rule that, unless the corporation is a sham, it must be recognized as a separate taxable entity if it was formed for a business purpose or carried on a business activity. The conclusion of the Court of Appeals that an alter ego corporation remains a separate taxable entity is contrary to the rationale of this basic rule. That rationale is that "he who lives by the sword, dies by the sword;" the taxpayer who secures the business advantages of incorporation cannot escape that tax disadvantages attendant thereto. Contrary to the suggestion by the Court of Appeals (711 F.2d at 580), it has never been petitioner's contention that the equitable principle of *Moline Properties* is irrelevant to the Bankruptcy context. Rather, petitioner contends that *Moline Properties* affirmatively requires the result for which he contends. Where the Bankruptcy Court strips the business advantages from the corporation, the equitable thrust of *Moline Properties* forbids the preservation of the corporate tax disadvantages.

As the District Court put it in *Collins v. United States*, 386 F. Supp. 17 (S.D.Ga. 1974), *aff'd*, 514 F.2d 1282 (5th Cir. 1974), "A taxpayer cannot shop on both sides of the street at the same time. He cannot avail himself of the business advantages of the corporate form while disregarding it in the case of its tax advantages." The single fact which distinguishes the present bankruptcy case from every other case relied on by the Court of Appeals is that, in

the bankruptcy context, the taxpayer is not attempting to shop both sides of the street. Rather, through its alter ego order, the Bankruptcy Court ordered that the taxpayer shall walk on the side of the street where creditors lie in wait. In such a case, it is inequitable for the Internal Revenue Service to tax him as if he were still walking the other side of the street.

Moreover, the literal language of *Moline Properties* makes it clear that "the corporate form may be disregarded where it is a sham or unreal. In such situations the form is a bald and mischievous fiction." 319 U.S. at 439. *See* also *Britt v. United States*, 431 F.2d 227, 233-234 (5th Cir. 1970); *Paymer v. Commissioner*, 150 F.2d 334, 336 (2d Cir. 1945); *Juniper Investment Co. v. United States*, 338 F.2d 356, 359-360 (U.S. Ct. Cl. 1964).

As recognized by the Court of Appeals, a corporation is a "sham" for purposes of *Moline* if its purpose is to defraud creditors. *See Paymer v. Commissioner*, *supra*. The Bankruptcy Court expressly found that to treat Lawler Cattle as a separate entity from Lawler "would perpetrate a fraud upon those creditors who extended credit to Lawler Cattle Co." The Bankruptcy Court, by virtue of its alter ego determination, has determined, in effect, that Lawler Cattle never existed as a separate corporation. Every action taken by the corporation, every debt incurred by the corporation, and every asset held by the corporation, throughout its corporate life, is to be attributed to Lawler individually. In view of the Bankruptcy Court's factual findings, Lawler Cattle must be treated as a sham corporation within the meaning of *Moline Properties*. The Court of Appeals could avoid this result only by reversing the express findings of the Bankruptcy Court.

Such findings, of course, must be affirmed unless clearly erroneous. *Matter of Multiphonics, Inc.*, 622 F.2d 709, 713 (5th Cir. 1980); *Matter of Bardwell*, 610 F.2d 228, 230 (5th Cir. 1980). This is especially true where another court has already reviewed those findings. *Matter of Multiphonics, Inc., supra.* Whether a corporation is an unreal sham and therefore to be disregarded for tax purposes is a factual issue, *Noonan v. Commissioner*, 451 F.2d 992, 993 (9th Cir. 1971); *Shaw Construction v. Commissioner*, 323 F.2d 316, 321 (9th Cir. 1963), and thus subject to the clearly erroneous rule.

The Court of Appeals did not find that the Bankruptcy Court's findings were clearly erroneous. The United States accepted the Bankruptcy Court's factual findings for the purpose of appeal, so that issue was not even before the Court of Appeals. The result is that, in failing to treat Lawler Cattle as a sham under *Moline Properties*, the Court flatly ignored the Bankruptcy Court's factual findings, a clear abuse of its appellate power.

CONCLUSION

For the reasons stated, Petitioner prays that its Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN THE MATTER OF H. ROGER LAWLER, Individually and doing business as LAWLER CATTLE COMPANY, LAWLER CORPORATION, LAWLER MANAGEMENT COMPANY; LAWLER INVESTMENT COMPANY; THE LAWLER FAMILY TRUSTS OF APRIL 10, 1968, DEBTORS L. E. CREEL, III, Trustee, *Plaintiff* VS. LAWLER CATTLE CO., *Defendant*	IN PROCEEDINGS FOR AN ARRANGEMENT UNDER CHAPTER XI NO. BK 3-76-346 G NO. BK 3-78-25 G NO. BK 3-78 219 G NO. BK 3-76-347 G (Consolidated)

ORDER DECLARING LAWLER CATTLE CO.
THE ALTER EGO OF H. ROGER LAWLER

On November 1, 1979, came on to be heard the Complaint filed herein on October 9, 1979 by L. E. Creel, III, the Trustee herein, praying judgment that Lawler Cattle Co. be adjudged the alter ego of the Debtor and that its assets be vested in the Debtor as of January 9, 1976 and be subject to the payment of the claims of all creditors of the Debtor and due notice of such Complaint and of the hearing thereon having been timely given to all creditors and other parties in interest and a summons and notice of trial having been duly and timely served upon the Defendant Lawler Cattle Co. and came the Plaintiff herein by his attorney, Vernon O. Teofan, the Defendant Lawler Cattle Co. by its president, H. Roger Lawler, and the United States of America by its

attorney, M. Bruce Peele, and introduced oral and documentary evidence and presented oral argument in support of their respective contentions;

Now after considering said Complaint, the Response of Lawler Cattle Co. thereto, the Motion to Dismiss and Response of United States of America, and the Plaintiff's Response to Motion to Dismiss Complaint Against Lawler Cattle Co. and from all the proceedings had before me, the evidence introduced and the oral arguments made;

The Court finds and concludes as follows:

1. On June 4, 1973, Lawler Cattle Co. was formed as a Nevada corporation. The initial capital contribution of $1,000.00 was advanced by H. Roger Lawler. No other capital contributions were ever made.

2. Lawler Cattle Co. was formed primarily for the purpose of managing the ranch and the cattle owned by H. Roger Lawler. Lawler Cattle Co. was to receive a 15 percent net profits interest in consideration for its management activities.

3. Lawler Cattle Co. managed only those cattle owned by H. Roger Lawler and never owned any cattle of its own.

4. On June 4, 1973, H. Roger Lawler was appointed President of Lawler Cattle Co. He additionally assumed the responsibilities of general manager on January 2, 1974.

5. At all times since the formation of Lawler Cattle Co., H. Roger Lawler has completely dominated, controlled and managed the assets and the business transactions and affairs of Lawler Cattle Co., treating its business and properties as his own, and operating it as an instrumentality of and agent for himself and for his own purposes in total disregard of the corporate form.

6. The verified schedules of H. Roger Lawler filed herein list debts of Lawler Cattle Co. as being debts of H. Roger Lawler, and include Lawler Cattle Co. as a name under which H. Roger Lawler has conducted his business.

7. The creditors of Lawler Cattle Co., in extending substantial credit to Lawler Cattle Co., were of the belief that Lawler Cattle Co. was H. Roger Lawler and that the credit extended was, in truth and in fact, extended to H. Roger Lawler.

8. Such creditors have filed claims in this proceeding and have participated herein as creditors of H. Roger Lawler. To treat Lawler Cattle Co. as an entity separate and distinct from H. Roger Lawler would perpetrate a fraud upon those creditors who extended credit to Lawler Cattle Co.

9. The assets of Lawler Cattle Co. were insufficient to provide adequate security for its indebtedness to the First National Bank of Nevada.

10. Lawler Cattle Co. was undercapitalized for its purposes at its inception and at all times thereafter.

11. Lawler Cattle Co. is now, and at all times since its inception has been, the alter ego of H. Roger Lawler.

12. There is no evidence in the record that the Plaintiff's purpose in filing his Complaint was to acquire the net operating loss of Lawler Cattle Co. for the benefit of H. Roger Lawler.

13. The United States has filed proofs of claim in this proceeding.

14. This Court has jurisdiction to grant the relief prayed for by the Plaintiff in his Complaint.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that:

(1) The Motion to Dismiss and Response of United States of America be, and the same hereby is, in all things, overruled and denied; and

(2) Lawler Cattle Co. is now, and at all times since its inception has been, the alter ego of H. Roger Lawler for all purposes; and

(3) The assets of Lawler Cattle Co. as of January 9, 1976 were the assets of H. Roger Lawler, the Debtor herein, subject to the payment of the claims of all creditors of the Debtor herein.

DATED at Dallas, Texas, this 28th day of April, 1980.

/s/ DEAN M. GANDY

Bankruptcy Judge

APPENDIX B

U.S. District Court
Northern District of Texas
FILED
Nov. 18, 1981
Joseph McElroy, Jr., Clerk
By .....
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

L. E. CREEL, III, TRUSTEE
vs.
UNITED STATES OF AMERICA

CIVIL ACTION
NO. CA3-80-1247-F

JUDGMENT

Came on before the Court the appeal from an Order Declaring Lawler Cattle Co. the Alter Ego of H. Roger Lawler entered by the Honorable Dean M. Gandy, Bankruptcy Judge in the United States District Court for the Northern District of Texas, Dallas Division. This Court has considered said order and the briefs and arguments of appellant and appellee and is of the opinion that the order is not clearly erroneous. It is, therefore,

ORDERED, ADJUDGED, and DECREED that the Order Declaring Lawler Cattle Co. the Alter Ego of H. Roger Lawler entered by the Honorable Dean M. Gandy, Bankruptcy Judge in the United States District Court for the Northern District of Texas, Dallas Division is hereby AFFIRMED.

Signed and entered this 18th day of November, 1981.

/s/ ROBERT W. PORTER
United States District Judge

APPENDIX C

C-1

UNITED STATES of America,
Plaintiff-Appellant,

v.

L.E. CREEL, III, Trustee,
Defendant-Appellee.

No. 82-1040.

United States Court of Appeals,
Fifth Circuit.

Aug. 12, 1982.

Bankruptcy Court decreed that bankrupt cattle corporation was alter ego of bankrupt individual incorporator. The United States District Court for the Northern District of Texas, Robert W. Porter, J., affirmed, and appeal was taken. The Court of Appeals, Brown, Circuit Judge, held that it was error to disregard cattle corporation's identity for income tax purposes where corporation was formed primarily for purpose of managing ranch and cattle owned by incorporator, who was also president and general manager, and corporation carried on business activity, regardless of whether it was alter ego of the incorporator for purpose of piercing the corporate veil.

Reversed and remanded.

1. Corporations — 1.6(12)

It was error to disregard cattle corporation's identity for income tax purposes where corporation was formed primarily to manage ranch and cattle owned by the incorporator, who was also president and general manager, and corporation carried on business activity, regardless of whether it was alter ego of the incorporator for purpose of piercing the corporate veil.

2. Corporations — 1.6(12)

So long as a corporation meets the *Moline Properties* test, it remains a separate taxable entity for federal income tax purposes notwithstanding that it might be an alter ego of its sole shareholder for purpose of piercing the corporate veil and allowing corporate creditor to reach incorporators individual assets and such rule is not changed by filing of bankruptcy petition.

Glenn L. Archer, Jr., Asst. Atty. Gen., Tax Div., Dept. of Justice, Michael L. Paup, Chief, Appellate Sect., Richard W. Perkins, Jay W. Miller, Washington, D.C., for plaintiff-appellant.

Ungerman, Hill, Ungerman, Angrist, Dolginoff, Teofan & Vickers, Vernon O. Teofan, Georg F. McElreath, Craig Randall Goodrum, Dallas, Tex., for defendant-appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, GOLDBERG and HIGGINBOTHAM, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

Begin the Bovine

This controversy is an offshoot of the bankruptcy proceedings of H. Roger Lawler, individually, and several related enterprises. At stake are the valuable bleached bones of the Lawler Cattle Company (L.C.C.), an ill-fated venture which amassed some two million dollars in losses in its approximately one and one-half years of operation. In this separate suit, instituted by trustee in bankruptcy L.E. Creel III, the bankruptcy court ruled that L.C.C. was Roger Lawler's "alter ego" for "all purposes." The district court affirmed on the ground that the bankruptcy court's findings were not clearly erroneous. The United States,

which has filed twelve million dollars worth of tax claims against Roger Lawler, argues that for taxation purposes L.C.C.'s corporate identity should be respected and the cattle operation losses attributed to the corporation rather than to Lawler personally. We agree. Accordingly, we reverse the district court and the bankruptcy court and remand.

Lawler Cattle Company was incorporated in Nevada in June 1973. The bankruptcy court found, and it is undisputed, that L.C.C.'s initial and only capital contribution, $1,000, was advanced by Roger Lawler and that the corporation was formed primarily for the purpose of managing Roger Lawler's ranch and cattle. After its formation, L.C.C. was substituted for Roger Lawler as debtor on a promissory note to the First National Bank of Nevada and as borrower on the agreement providing the Bank with a security interest in the cattle to be purchased. Between August 31, 1973 and February 13, 1974, L.C.C. procured loans from the Bank totaling in excess of 3.4 million dollars.[1] During its brief and catastrophic existence, L.C.C. employed as many as 24 people.

As the cattle purchased were not suited to the desert environment of the Nevada ranch, L.C.C. incurred severe losses. It filed a corporate tax return for its fiscal operating year 1973, showing a net operating loss of $2,207,471.42.[2] L.C.C. ceased operations sometime in 1974.

The Magnificent Chapter Seven

On January 9, 1976, in Nevada, involuntary petitions were filed under Chapter VII of the old Bankruptcy Act against

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[1]Apparently, the outstanding debt at any one time never exceeded $2,234,886.65.

[2]Approximately 1.6 million dollars of the loss was from the sale of goods—the loss from the sale of the cattle. The remainder was primarily attributable to ranch expenses and interest payments.

Roger Lawler and Lawler Land and Cattle Company.[3] The petitions were contested and venue transferred to the northern district of Texas, where the United States filed its proofs of claim for approximately twelve million dollars in income taxes due from Roger Lawler individually. Roger Lawler consented to adjudication. Thereafter, the appointed trustee, Creel, successfully applied for orders declaring Lawler Corporation, Lawler Family Trust and Lawler Management Company to have been from their inception alter egos of Roger Lawler for all purposes. On June 20, 1979, the bankruptcy court issued such an order regarding L.C.C. After it was determined that L.C.C. was not even a party and hence was not properly before the court, the trustee instituted the present proceeding seeking to have L.C.C. declared Roger Lawler's alter ego. The government filed a motion for dismissal arguing that the order should not be granted insofar as it would require that L.C.C.'s corporate entity be disregarded for taxation purposes. On April 28, 1980, after hearing, the bankruptcy court (1) denied the United States' motion and decreed that

> (2) Lawler Cattle Co. is now, and at all times since its inception has been, the alter ego of H. Roger Lawler for all purposes; and
>
> (3) The assets of Lawler Cattle Co. as of January 9, 1976 were the assets of H. Roger Lawler, the Debtor herein, subject to the payment of the claims of all creditors of the Debtor herein.[4]

The district affirmed in November, 1981.

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[3] Lawler Cattle Company and Lawler Land and Cattle Company are not the same entity. L.C.C. is the corporation whose taxable status is at issue here, while L.L.C.C. apparently was simply a company name under which Roger Lawler conducted some business.

[4] The court's complete findings and conclusions are set forth below:

> 1. On June 4, 1973, Lawler Cattle Co. was formed as a Nevada corporation. The initial capital contribution of $1,000.00 was advanced by H. Roger Lawler. No other capital contributions were ever made.

2. Lawler Cattle Co. was formed primarily for the purpose of managing the ranch and the cattle owned by H. Roger Lawler. Lawler Cattle Co. was to receive a 15 percent net profits interest in consideration for its management activities.

3. Lawler Cattle Co. managed only those cattle owned by H. Roger Lawler and never owned any cattle of its own.

4. On June 4, 1973, H. Roger Lawler was appointed President of Lawler Cattle Co. He additionally assumed the responsibilities of general manager on January 2, 1974.

5. At all times since the formation of Lawler Cattle Co., H. Roger Lawler has completely dominated, controlled and managed the assets and the business transactions and affairs of Lawler Cattle Co., treating its business and properties as his own, and operating it as an instrumentality of and agent for himself and for his own purposes in total disregard of the corporate form.

6. The verified schedules of H. Roger Lawler filed herein list debts of Lawler Cattle Co. as being debts of H. Roger Lawler, and include Lawler Cattle Co. as a name under which H. Roger Lawler has conducted his business.

7. The creditors of Lawler Cattle Co., in extending substantial credit to Lawler Cattle Co., were of the belief that Lawler Cattle Co. was H. Roger Lawler and that the credit extended was, in truth and in fact, extended to H. Roger Lawler.

8. Such creditors have filed claims in this proceeding and have participated herein as creditors of H. Roger Lawler. To treat Lawler Cattle Co. as an entity separate and distinct from H. Roger Lawler would perpetrate a fraud upon those creditors who extended credit to Lawler Cattle Co.

9. The assets of Lawler Cattle Co. were insuffcient to provide adequate security for its indebtedness to the First National Bank of Nevada.

10. Lawler Cattle Co. was undercapitalized for its purposes at its inception and at all times thereafter.

11. Lawler Cattle Co. is now, and at all times since its inception has been, the alter ego of H. Roger Lawler.

12. There is no evidence in the record that the Plaintiff's purpose in filing his Complaint was to acquire the net operating loss of Lawler Cattle Co. for the benefit of H. Roger Lawler.

13. The United States has filed proofs of claim in this proceeding.

14. This Court has jurisdiction to grant the relief prayed for by the Plaintiff in his Complaint.

The Eyes of Taxes

[1] The sole issue before us is whether the district court was in error in declaring L.C.C. to have been Roger Lawler's alter ego *for all purposes*, and in declaring the assets of L.C.C. to have been the assets of Roger Lawler, insofar as that order required the corporation to be disregarded for tax purposes. The government has never challenged that aspect of the alter ego determination which allows L.C.C.'s creditors to reach Roger Lawler's individual assets, whatever those may be. That portion of the order stands. Because L.C.C. clearly meets the standard enunciated by the Supreme Court in *Moline Properties, Inc. v. Commissioner of Internal Revenue*, 319 U.S. 436, 63 S.Ct. 1132, 87 L.Ed. 1499 (1943), however, we reverse the bankruptcy court's order insofar as it disregards L.C.C.'s corporate identity for income tax purposes.

In *Moline Properties*, the Court stated,

> The doctrine of corporate entity fills a useful purpose in business life. Whether the purpose be to gain an advantage under the law of the state of incorporation or to avoid or to comply with the demands of creditors or to serve the creator's personal or undisclosed convenience, so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity. [citations omitted] 319 U.S. at 438-39, 63 S.Ct. at 1133-34, 87 L.Ed. at 1502.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that:

(1) The Motion to Dismiss and Response of United States of America be, and the same hereby is, in all things, overruled and denied; and

(2) Lawler Cattle Co. is now, and at all times since its inception has been, the alter ego of H. Roger Lawler for all purposes; and

(3) The assets of Lawler Cattle Co. as of January 9, 1976 were the assets of H. Roger Lawler, the Debtor herein, subject to the payment of the claims of all creditors of the Debtor herein.

Clearly, under *Moline Properties*, L.C.C. is a separate taxable entity. Although only one of the two parts of the *Moline Properties* test need be satisfied, it is patently obvious that L.C.C. was both organized for a business purpose and actually carried on business activity. As the bankruptcy court itself found, L.C.C. was formed "primarily for the purpose of managing the ranch and the cattle owned by H. Roger Lawler." This business purpose alone is sufficient to satisfy the *Moline Properties* standard. Moreover, it is undisputed that L.C.C. obtained loans of over $3,000,000, employed a number of people, bought and sold cattle,[5]

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[5]The bankruptcy court found that "Lawler Cattle Co. managed only those cattle owned by H. Roger Lawler and never owned any cattle of its own." It is clear from the record, however, that L.C.C. held record title to at least some of the cattle. The parties disagree as to whether L.C.C. or Roger Lawler had legal and equitable ownership of the livestock. Past cases reveal that the answer to the question of who has legal or equitable ownership of some or all corporate assets does not determine a corporation's status for taxation purposes.

> The taxpayers take the position that the mere carrying on of business by the corporation, to satisfy this requirement of the Moline Properties case, must be business relating to property to which it has title, either legal or equitable. They contend that this corporation was the holder of a mere naked record title with neither legal nor equitable ownership of the property and that therefore such business as was carried on by the corporation does not fall within the formula that is above set out. We find no such limitation in the formula adopted by the Supreme Court in the Moline Properties case.
>
> *Tomlinson v. Miles*, 316 F.2d 710, 714 (5th Cir.1963). *See also Evans v. Commissioner of Internal Revenue*, 557 F.2d 1095 (5th Cir. 1977); *Harrison Property Management Co., Inc. v. United States*, 475 F.2d 623 (Ct.Cl.1973).
>
> As we pointed out in *Tomlinson*, the *Moline Properties* Court reached its decision that the corporation involved was a separate taxable entity "notwithstanding the findings of the Tax Court that *full beneficial ownership* of the property there involved was in the sole stockholder." [emphasis in original] *Id.*, at 714, *citing National Carbide Corporation v. Commissioner of Internal Revenue*, 336 U.S. 422, 69 S.Ct. 726, 93 L.Ed. 779 (1949).

executed promissory notes, filed tax returns, negotiated for the purchase of land, and defended itself in a lawsuit.* Plainly, L.C.C. was both organized for a business purpose and actually carried on business activity.

The Trustee steers our attention toward the Supreme Court's observation in *Moline Properties* that

> In general, in matters relating to the revenue, the corporate form may be disregarded where it is a sham or unreal. In such situations the form is a bald and mischievous fiction. [citations omitted]

319 U.S. at 439, 63 S.Ct. at 1134, 87 L.Ed. at 1503.

The Trustee argues that "alter ego" and "sham" are synonymous and that therefore—because of the bankruptcy court's finding of alter ego—L.C.C.'s corporate form must be disregarded "as a bald and mischievous fiction." The fact is, however, that in the corporate context, "alter ego" and "sham" are not synonymous, as the case law illustrates. A sham corporation may be one established for no valid purpose, such as a corporation formed solely for the purpose of escaping taxation, *see National Carbide*, 336 U.S. at 437, n. 20, 69 S.Ct. at 734, n. 20, 93 L.Ed. at 788, or defrauding creditors, *see Paymer v. Commissioner of Internal Revenue*, 150 F.2d 334 (2d Cir. 1945). As the Supreme Court pointed out in *National Carbide*.

> [The Court of Appeals] held that under our decisions, when a corporation carries on business activity the fact that the owner retains direction of its affairs down to the minutest detail, provides all of its assets and takes all of its profits can make no difference tax-wise. . . . The result reached by the Court of Appeals is clearly required by our later decisions. 336 U.S. at 431-32, 69 S.Ct. at 731, 93 L.Ed. at 785.

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*In September 1973, Vice President Harry Conley signed a contract for the purchase of ranch land on behalf of L.C.C. In June 1974, L.C.C. answered to complaint number 295308, Nevada Supplement Co. v. Lawler Cattle Co., filed against it in the Second Judicial District Court of Nevada, County of Washoe.

[2] Clearly such a corporation might be held to be an alter ego for the purpose of piercing the corporate veil and allowing the corporate creditors to reach the assets of the individual.[7] So long as the corporation meets the test set forth in *Moline Properties*, however, it remains a separate taxable entity. As the Court of Claims expressed it in *Harrison Property Management Co., Inc. v. United States*, 475 F.2d 623, 626 (Ct.Cl. 1973),

> Where individuals adopt the corporate form for purposes of their own, the choice of the advantages of incorporation to do business requires 'the acceptance of the tax disadvantages.' [*Moline Properties*, 319 U.S. at 439, 63 S.Ct. at 1134, 87 L.Ed. at 1503] It is immaterial that the shareholders remain the beneficial owners of the property transferred to the company, or that the latter's policies and day-to-day activities are determined, not as decisions of the corporation, but by the owners acting individually. *National Carbide Corp. v. Commissioner*, *supra*, 336 U.S. at 433-34, 69 S.Ct. at 732; *Tomlinson v. Miles*, *supra*, 316 F.2d at 714; *Carver v. United States*, *supra*, 412 F.2d [233] at 239, 188 Ct.Cl. [202] at 212-13. By the same token, it does not matter that the corporation is regarded by its owners as a simple 'dummy'. *National Carbide Corp. v. Commissioner*, *supra*, 336 U.S. at 433, 69 S.Ct. at 732; *Love v. United States*, *supra*, 96 F.Supp. [919] at 922, 119 Ct.Cl. [384] at 405. The controlling tests, ignoring the fact that the corporation is substantially the *alter ego* of the

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[7] *See, e.g., Holmes v. Clow*, 533 S.W.2d 99, 101-02 (Tex.Civ. App.1976):

> In order to warrant piercing the corporate veil, the courts generally require the presence of one or more of the following factual situations: (1) evidence that the corporate entity amounts to a fraud, promotes injustice, or it is relied on to justify a wrong, (2) that it was inadequately capitalized, (3) that an individual controls and manages the entity in such a manner that it becomes its alter ego, and (4) that the corporate formalities were not adhered to by the corporation. Each case must rest on its special facts.

> stockholders, concentrate on the reasons why the 'dummy' was created, and what it actually does. [emphasis in original]

See also Evans v. Commissioner of Internal Revenue, 557 F.2d 1095 (5th Cir. 1977).

The trustee argues that *Moline Properties* is built on the equitable principle that a taxpayer who chooses the corporate form must accept the disadvantages as well as the advantages of that form. *See* 319 U.S. at 439, 63 S.Ct. at 1134, 87 L.Ed. at 1503. That principle, he argues, is not relevant to this situation in bankruptcy, where respecting the corporate entity may preclude L.C.C.'s losses from being attributed to Roger Lawler personally and thus reduce the assets available to Roger Lawler's creditors, other than the government. We do not believe, however, that equity calls for the sudden abandonment of a corporation's independently taxable status once a bankruptcy petition is filed. Indeed, equity argues for the corporation to be treated consistently with the principles of taxation which governed its formation and existence. We are convinced that the *Moline Properties* test for determining whether a corporation is a separate taxable entity applies to this situation.

The trustee argues also that L.C.C. is exempt from taxation under the exception for the income of "true corporate agents", articulated in *National Carbide*.

> What we have said does not foreclose a true corporate agent or trustee from handling the property and income of its owner-principal without being taxable therefor. Whether the corporation operates in the name and for the account of the principal, binds the principal by its actions, transmits money received to the principal, and whether receipt of income is attributable to the services of employees of the principal and to assets belonging to the principal are some of the relevant considerations in determining whether a true agency exists. If the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal, if

such is the case. Its business purpose must be the carrying on of the normal duties of an agent.

336 U.S. at 437, 69 S.Ct. at 734, 93 L.Ed. at 788.

We are skeptical of the claim that L.C.C.'s relations with Roger Lawler were independent of Lawler's ownership and control of the corporation, as required by *National Carbide.* Indeed, the bankruptcy court's finding that L.C.C. was Roger Lawler's alter ego almost necessarily forecloses that possibility. As this issue was neither raised before nor decided by the court below, however, we need not and do not decide whether L.C.C. is exempt from taxation as Roger Lawler's agent.[8]

Finally, the trustee points to §§ 671-77 of the Internal Revenue Code, 26 U.S.C. §§ 671-77, which deal with the circumstances under which trust income deductions and credits may be attributed to trust grantors for purposes of taxation. Under these sections of the Inernal Revenue Code, a grantor's retention of any of several enumerated powers over a trust may cause trust assets to be attributed to the grantor for tax purposes. The trustee argues that, by analogy, an individual's control of the assets of an alter ego corporation must call for the abandonment of the corporation as a separate taxable entity, because the individual's control of the corporation is likely to be far greater than the individual's control over the trusts described in the Internal Revenue Code.

We find no merit in either the analogy or the argument. Sections 671-77 of the Internal Revenue Code—which deal exclusively with trusts—in no way reflect the manner in which the assets of corporations should be treated for income tax purposes. *Moline Properties,* not irrelevant sections of the Internal Revenue Code, sets forth the test for deciding

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[8]The bankruptcy court found that Lawler operated L.C.C. "as an instrumentality of and agent for himself and for his own purposes. . . ." Nothing in the record indicates that this use of the word "agent" was intended as a finding that L.C.C. was a corporate agent in the sense referred to in *National Carbide.*

when the corporate entity is to be disregarded for income tax purposes. So long as the purpose of incorporation "is the equivalent of business activity or is followed by the carrying on of business by the corporation," the corporate identity is to be respected and maintained.

Happy Trials

The bankruptcy court erred in determining that L.C.C.'s assets were to be considered those of Roger Lawler individually, insofar as that order required the disregard of L.C.C. as an independent taxable entity. The district court erred in affirming the bankruptcy court's order in this respect.

REVERSED AND REMANDED.

APPENDIX D

D-1

U.S. Court of Appeals
FILED
Sep 29 1983
Gilbert F. Ganucheau
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1040

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

L.E. CREEL, III, Trustee,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING
(September 29, 1983)

Before BROWN, GOLDBERG and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE
COURT:

/s/ JOHN R. BROWN
United States Circuit Judge

APPENDIX E

BANKRUPTCY ACT, prior to 1978 amendment (11 U.S.C.A. § 11a(15))

Sec. 11. Creation of courts of bankruptcy and their jurisdiction.

(a) The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

(1) Adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or for a longer portion of the preceding six months than in any other jurisdiction, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdiction, or in any cases transferred to them pursuant to this title;

(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

(2A) Hear and determine, or cause to be heard and determined, any question arising as to the amount or legality of any unpaid tax, whether or not previously assessed, which has not prior to bankruptcy been contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction, and in respect to any tax, whether or not paid, when any such question has been contested and adjudicated by a judicial or administrative tribunal of competent jurisdiction and the time for appeal or review has not expired, to authorize the receiver or the trustee to prosecute such appeal or review;

(3) Appoint, upon the application of parties in interest, receivers or the marshals to take charge of the property of bankrupts and to protect the interests of creditors after the filing of the petition and until it is dismissed or the trustee is qualified; and to authorize such receiver, upon his application, to prosecute or defend any pending suit or proceeding by or against a bankrupt or to commence and prosecute any suit or proceeding in behalf of the estate, before any judicial, legislative, or administrative tribunal in any jurisdiction, until the petition is dismissed or the trustee is qualified: *Provided, however,* That the court shall be satisfied that such appointment or authorization is necessary to preserve the estate or to prevent loss thereto;

(4) Arraign, try, and punish persons for violations of this title, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States;

(5) Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, as provided in section 76 of this title;

(6) Bring in and substitute additional persons or parties in proceedings under this title when necessary for the complete determination of a matter in controversy;

(7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; and where in a controversy arising in a proceeding

under this title an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;

(8) Close estates, by approving the final accounts and discharging the trustees, whenever it appears that the estates have been fully administered or, if not fully administered, that the parties in interest will not furnish the indemnity necessary for the expenses of the proceeding or take the steps necessary for the administration of the estate; and reopen estates for cause shown;

(9) Confirm or reject arrangements or plans proposed under this title, set aside confirmations of arrangements or wage-earner plans and reinstate the proceedings and cases;

(10) Consider records, findings, and orders certified to the judges by referees, and confirm, modify, or reverse such findings and orders, or return such records with instructions for further proceedings;

(11) Determine all claims of bankrupts to their exemptions;

(12) Discharge or refuse to discharge bankrupts, set aside discharges, determine the dischargeability of debts, and render judgments thereon;

(13) Enforce obedience by persons to all lawful orders, by fine or imprisonment or fine and imprisonment;

(14) Extradite bankrupts from their respective districts to other districts;

(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically pro-

vided for, as may be necessary for the enforcement of the provisions of this title: *Provided, however,* That an injunction to restrain a court may be issued by the judge only;

(16) Punish persons for contempts committed before referees;

(17) Approve the appointment of trustees by creditors or appoint trustees when creditors fail so to do; and, upon complaints of creditors or upon their own motion, remove for cause receivers or trustees upon hearing after notice;

(18) Tax costs and render judgments therefor against the unsuccessful party, against the successful party for cause, in part against each of the parties, and against estates, in proceedings under this title;

(19) Transfer cases to other courts of bankruptcy;

(20) Exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy: *Provided, however,* That the jurisdiction of the ancillary court over a bankrupt's property which it takes into its custody shall not extend beyond preserving such property and, where necessary, conducting the business of the bankrupt, and reducing the property to money, paying therefrom such liens as the court shall find valid and the expenses of ancillary administration, and transmitting the property or its proceeds to the court of primary jurisdiction;

(21) Require receivers or trustees appointed in proceedings not under this title, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control to the receiver or trustee appointed under this title or, where an arrangement or a plan under this title has

been confirmed and such property has not prior thereto been delivered to a receiver or trustee appointed under this title, to deliver such property to the debtor or other person entitled to such property according to the provisions of the arrangement or plan, and in all such cases to account to the court for the disposition by them of the property of such bankrupt or debtor: *Provided, however,* That such delivery and accounting shall not be required, except in proceedings under section 205 and chapters 10 and 12 of this title, if the receiver or trustee was appointed, the assignment was made, or the agent was authorized more than four months prior to the date of bankruptcy. Upon such accounting, the court shall reexamine and determine the propriety and reasonableness of all disbursements made out of such property by such receiver, trustee, assignee, or agent, either to himself or to others, for services and expenses under such receivership, trusteeship, assignment, or agency, and shall, unless such disbursements have been approved, upon notice to creditors and other parties in interest, by a court of competent jurisdiction prior to the proceeding under this title, surcharge such receiver, trustee, assignee, or agent the amount of any disbursement determined by the court to have been improper or excessive; and

(22) Exercise, withhold, or suspend the exercise of jurisdiction, having regard to the rights or convenience of local creditors and to all other relevant circumstances, where a bankrupt has been adjudged bankrupt by a court of competent jurisdiction without the United States.

(b) Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.